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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42119

NORTH AMERICA FREIGHT CAR ASSOCIATION v. UNION PACIFIC RAILROAD COMPANY

Digest:[1] This decision finds that three portions of Union Pacific Railroad Company's (UP) tariff, which involve a surcharge for a shipper's failure to remove lading residue from railcars, have not been shown to be an unreasonable practice. The record indicates that lading residue on railcars poses a safety risk and that UP's tariff is meant to help address the associated safety hazards and operational disruptions. However, the Board finds that one portion of the tariff, which assesses a surcharge for lading residue found after a car has left the customer's facility and begun moving in line-haul service, has been shown to be unreasonable.

Decided: March 11, 2015

In an amended complaint filed on July 7, 2011, North America Freight Car Association (NAFCA) alleges that provisions of Item 200-B of Union Pacific Railroad Company's (UP) Tariff 6004-C constitute an unreasonable practice under 49 U.S.C. § 10702 and violate UP's common carrier obligation. This decision finds that Item 200-B(1) and Item 200-B(2) of UP's tariff reasonably encourage shippers to help minimize the safety hazards caused by lading residue on railcars, but that Item 200-B(3), regarding railcars found to be contaminated with lading residue en route, constitutes an unreasonable practice. Item 200-B(4), regarding liability, does not alter the parties' status as to liability for loss under state law, and is therefore not unreasonable.

BACKGROUND

NAFCA originally filed a complaint against UP alleging that provisions of Item 200-A of UP's Tariff 6004-C constitute an unreasonable practice and violate UP's common carrier obligation.[2] At the parties' request, the proceeding was held in abeyance to allow the parties to

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] Item 200-A was issued by UP on October 22, 2008.

engage in informal discovery and consider mediation to resolve the dispute or narrow the issues. NAFCA later notified the Board that the parties had failed to reach a negotiated agreement and filed its first amended complaint, challenging new Item 200-B of UP's Tariff 6004-C (Item 200-B or the tariff).

Item 200-B. The tariff at issue is directed at lading residue—residue from commodities such as petroleum, tallow, lard, and molasses—that can stick to the exterior of a railcar during loading or unloading. The tariff, which requires shippers[3] to remove lading residue from unclean cars or pay a surcharge, has four sections. Item 200-B(1) (Section I) addresses what happens when the lading residue is discovered when a shipper first tenders the railcars to UP. Item 200-B(2) (Section II) addresses what happens when UP discovers the residue after the railcars are tendered, but while they are still within the shipper's facility. Item 200-B(3) (Section III) addresses what happens when UP discovers the residue after the railcar is en route (i.e., after it has been tendered to UP and removed from the shipper's facility). Finally, Item 200-B(4) (Section IV) addresses liability. The tariff provides that if it discovers a railcar in an unsafe condition for movement due to lading residue, UP may assess a $650 surcharge against the party that released the car, plus additional switching charges if the car has to be taken out of a train. The specific provisions of the tariff at issue are set forth in relevant part below.

Section I, entitled "Tendering Cars Safe for Movement," states:

> Consignor, consignee or agent releasing a loaded or empty railcar for movement on UP's lines shall remove lading residue from the railcar's exterior, including the wheels, brakes, and safety appliances (ladders, handholds, brake handles, catwalks, etc.) and ensure that all valves and discharge ports are properly secured and, if necessary, sealed to prevent leakage during rail movement before tendering the car for movement. If UP rejects the car as unsafe for movement, UP may assess the party that released the car a $650.00 surcharge per car rejected.

Section II, entitled "Setting Out Unsafe Cars at Origin or Destination," states:

> If UP discovers that the railcar is in an unsafe condition for movement due to the failure to remove lading residue or to properly secure (and seal, if necessary) after the car was switched from the spot where it was tendered but while still within the facility where it was loaded or unloaded, UP will remove the car from the train and set it out for consignor, consignee or agent to clean, secure or seal, as necessary. UP may assess the party that released the car before it was suitable for movement a $650.00 surcharge per car set out for cleaning, securing or sealing. UP may also assess applicable intraplant

[3] In this decision, the term "shipper" is used to describe both shippers and receivers involved in loading and unloading activities, and cars with lading residue are described as "unclean."

switch charges as published in UP Tariff 6004-series for removing the car from the train and setting it out.

Section III, entitled "Setting Out Unsafe Cars Enroute," states:

> If UP discovers that the railcar is in an unsafe condition for movement due to the failure to remove residue or to properly secure (and seal, if necessary) after the car was removed from the facility where it was loaded or unloaded, UP will set out the car and notify the consignor, consignee or agent responsible for releasing or tendering of the car, of its condition and location. That party will be responsible, at its own cost, for the expenses associated with returning the car to a clean and safe condition, as well as properly disposing of residue or debris resulting from this cleaning, securing or sealing. UP may assess that party a $650.00 surcharge per car set out for cleaning, securing or sealing. UP may also assess applicable switch charges as published in UP Tariff 6004-series for removing the car from the train and returning the car to a train.

Section IV, regarding liability, states:

> Assessment and/or payment of the foregoing charges and surcharges will not relieve the consignor, consignee, or agent of its responsibility for any property damage, costs associated with environmental contamination and cleanup, personal injury, or death attributable to lading leakage or lading residue on the exterior of railcars, including wheels, brakes, and safety appliances. UP's acceptance of a railcar that is later determined to be leaking or to have lading residue on its exterior will in no way relieve the consignor, consignee, or agent of its obligations herein, and shall not constitute a waiver by UP of the consignor's, consignee's or agent's obligations to tender railcars suitable for safe movement.

NAFCA's Position. Although it does not contest the fact that product residue on wheels can create a safety concern,[4] NAFCA argues that the tariff unfairly shifts the costs, burdens, and risks associated with lading residue to UP's customers, rather than forcing UP to take preventative measures to reduce them. NAFCA points out that Federal Railroad Administration (FRA) regulations at 49 C.F.R. § 215 require the rail carrier to inspect freight cars before a train departs. NAFCA argues that lading residue should be discovered during these inspections. Moreover, NAFCA asserts that, by requiring the shipper to perform an inspection, the tariff shifts UP's regulatory responsibility to the shippers. According to NAFCA, the tariff could hold shippers responsible for lading residue left on railcars by previous receivers, thereby forcing them to clean dirty cars they receive from UP or be in jeopardy of being fined.

[4] While NAFCA argues that UP exaggerates the need for Item 200-B and has not reported any personal injuries resulting from residue-related incidents, it acknowledges that unclean safety appliances can present a safety hazard. NAFCA Final Brief 6; NAFCA Rebuttal 19.

NAFCA also asserts that Section IV of the tariff unfairly imposes absolute liability on a consignor even if UP failed to adequately inspect the railcar. Because the liability provision could be applied to a customer for residue left on the car by another party, NAFCA argues that it could improperly limit the defenses a shipper would have in a civil lawsuit.[5]

UP's Position. UP states that the tariff was established to reduce safety hazards and to ensure the reliability and efficiency of its operations.[6] UP notes that product residue can interfere with the operation of retarders[7] and result in "overspeeds" that can cause derailments, collisions, or other incidents. UP also points out that product residue on safety appliances, such as ladders, handholds, brake handles, running boards, and catwalks,[8] creates hazards for UP personnel as well as customers and emergency responders.[9] UP argues that because unsafe lading residue is typically introduced during the loading or unloading process, the responsibility for removing it, whenever it is detected, remains on the party that controlled the loading or unloading process. UP claims that it may establish a tariff that seeks to deter shippers and receivers from tendering unclean and unsafe railcars, and that its tariff is designed to accomplish that goal.

PRELIMINARY MATTERS

NAFCA filed a motion to strike portions of UP's final brief, on the ground that, contrary to the Board's order allowing the filing of simultaneous final briefs, UP did not, until its final brief, cite to certain discovery responses and other evidence that had not previously been introduced into evidence.[10] UP points out in its reply to NAFCA's motion to strike that one of the discovery documents at issue (the "Damage Prevention" database) was specifically discussed in the verified statement of Wayne L. Ronci, UP's Director, Damage Prevention Field Services, submitted on reply.[11] As to the other, UP points out that it offered a publicly available document to address a NAFCA argument. Thus, UP did not include new attachments or exhibits in its brief

[5] NAFCA Opening 6; NAFCA Rebuttal 5-6.

[6] UP Reply 8.

[7] Retarders are devices used at hump classification yards to slow cars so that they can be safely coupled with other cars on the classification tracks.

[8] Id. at 11; V.S. Ronci 8.

[9] UP Reply 11-12.

[10] NAFCA challenges, in particular, the portions of the UP Final Brief at 7, 11.

[11] Ronci, in discussing problem areas for UP, pointed out that 20 commodities identified in the Damage Prevention database had been associated with overspeeds. He indicated that the database had been provided to NAFCA during discovery. UP Reply, V.S. Ronci, 7 and n.4. The portions of the brief NAFCA seeks to strike reference discovery that contains the same Bates numbers as the exhibits to Ronci's verified statement. V.S. Ronci, Ex. 3.

or refer to material outside the scope of the arguments. As UP did not introduce new evidence in its final brief, NAFCA's motion to strike will be denied.

DISCUSSION AND CONCLUSIONS

In this case, we are asked to determine whether UP's tariff requirements constitute an unreasonable practice. Under 49 U.S.C. § 10702(2), a rail carrier must establish reasonable rules and practices for the transportation and service it provides. The legal standard for determining whether a particular practice is unreasonable varies depending on the nature of the case. The Board may look to a number of different factors to determine whether a practice is unreasonable, and the Board analyzes what it views as the most appropriate factors in each particular case. Ark. Elec. Coop. Corp.—Pet. for Declaratory Order (Coal Dust I), FD 35305, slip op. at 5 (STB served Mar. 3, 2011).

The tariff at issue implicates responsibilities of the shipper tendering loaded cars for shipment, the receiver returning empty cars after unloading, and the carrier moving those cars. UP says that because leakage is typically caused by actions taken during loading and unloading, the tariff is fair because it is designed to encourage shippers tendering cars to meet their obligation to load properly, and to encourage receivers returning cars to meet their obligation to unload properly. NAFCA states that sometimes cars are unclean because of actions of the prior consignee during the unloading process.[12] NAFCA argues that penalizing the party tendering goods for a new shipment is unfair because, by accepting from the prior customer an unclean car and then passing it on to the next customer, UP fails to meet its own obligation to provide clean and safe railcars to the shipper in the first place; to inspect the tendered railcars; and to safely transport the railcars to their destination. In determining whether the railroad's actions represent a "reasonable accommodation" between the railroad's concerns and the customer's needs," Granite State Concrete Co. v. STB, 417 F.3d 85, 93 (1st Cir. 2005), it is these conflicting points of view that we must consider.

As discussed below, we find that Sections I, II, and IV of the tariff are not unreasonable, but that Section III constitutes an unreasonable practice under 49 U.S.C. § 10702.

Section I. Section I of the tariff provides that if UP identifies a problem before it switches the car into a train, UP may reject the car and assess the party that released the car a $650.00 surcharge. As noted, NAFCA argues that the FRA regulations mandating inspections, along with the statutory provisions of 49 U.S.C. § 11121 directing carriers to furnish safe and adequate car service,[13] put the onus for checking for lading residue on UP, and that UP should

[12] NAFCA Final Brief 12.

[13] 49 U.S.C. § 11121(a)(1) provides, "A rail carrier providing transportation ... shall furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service."

not be permitted to shift its own responsibilities onto its customers.[14] UP, in contrast, argues that it may establish a tariff that seeks to deter shippers and receivers from tendering unclean and unsafe railcars, and that its tariff is designed to accomplish that goal. UP also argues that because lading residue issues typically arise as a result of the loading and unloading processes, which are under the control of the shipper, it is appropriate for the carrier to hold the shipper responsible.

Although NAFCA suggests that UP's concerns are overstated, there is no dispute that lading residue on railcars poses a safety risk; that operations involving railcars with lading residue can malfunction; and that, apart from the risk of injury, UP suffers costs and operational disruptions dealing with these problems.[15] And although it argues that the lading residue is often the fault of the party unloading the prior shipment (a point that UP disputes, UP Reply 42), and that in such cases it is UP's responsibility,[16] NAFCA concedes that a newly loaded car tendered by a shipper "is bound to accumulate some degree of product residue while it is being loaded." Id. As such, we find that a tariff penalizing shippers that do not implement measures to remove lading residue that occurs when the car is in the control of the shipper, and to secure cars before tendering them for movement, is not unreasonable. Nor does the level of the penalty in the tariff—which is not intended to be precisely cost-based—seem excessive given the potential disruptions that unclean cars can produce.[17]

As UP details in its reply, for most customers, lading residue on cars is not an issue because they have already implemented preventative measures—in some cases, after being informed by UP about its concerns. UP points, out as an example, that some shippers have installed power washing equipment and wash the cars—particularly the wheels and safety

[14] NAFCA's analogy to Consolidated Rail Corp. v. ICC, 646 F. 2d 642 (D.C. Cir. 1980) —a case in which the court affirmed an agency decision holding that a rail carrier could not, on safety grounds, offer only "special train service" rather than ordinary common carrier service for spent nuclear fuel shipments that met federal safety standards—is unsound. First, spent nuclear fuel is governed by an elaborate and comprehensive set of federal standards, while there are no federal safety standards explicitly governing lading residue on cars. Second, here UP is not refusing to hold out ordinary common carrier service, as was the case with spent nuclear fuel, but is only assessing a surcharge.

[15] UP points out that it has had several "FRA-reportable" incidents attributable to foreign materials on railcar wheels, leading to substantial monetary damages and other operational disruptions, and many other incidents not serious enough to meet FRA reporting thresholds but still serious enough to cause disruption and damage. UP Reply 10. UP also points out that even when it catches an unsafe car early in the process, correcting the problem produces unquantifiable operational disruptions and costs. Id. at 12-13.

[16] See NAFCA Opening 20 ("The presentation of 'unclean' cars by UP for loading in fact is the rule, rather than the exception.").

[17] See, e.g., Coal Dust I, slip op. at 6.

appliances, where the lading residue can create safety problems—before the car is released by the shipper. Also, as UP states, a shipper can prevent some leaking lading residue simply by making sure that the valves on the car are properly secured.

NAFCA argues that because the FRA requires carriers to inspect railcars before the cars depart the location in a train, this tariff rule essentially shifts that burden to the shipper. But UP points out that the purpose of the FRA-mandated inspection is for the carrier to identify "readily discoverable" defects to the car, such as objects dragging underneath the car or broken or cracked wheels. The inspection is not intended to provide a level of scrutiny that would allow the carrier to identify lading residue in every situation.[18] Moreover, even if a defect is discovered during the carrier's FRA-mandated inspection, UP still encounters some level of costs and operational disruptions in rectifying the matter.

NAFCA also argues that the provision is unfair because a surcharge could be applied even on a car that the shipper received for loading with lading residue already on it. As UP points out, UP Reply 30, the penalty applies to both shippers loading cars and to receivers returning cars; therefore, it should motivate receivers to clean their cars before returning them to UP. But even if UP does not detect residue before turning the cars over to the next shipper, that shipper can check the equipment it receives and reject unclean cars rather than putting them into service.[19] In doing so, the shipper can avoid triggering the tariff at issue.

NAFCA says that because UP forwards so many cars that have been dirtied by the prior consignee in the unloading process (again, a claim that UP contests), it would be too disruptive to shippers to have to avail themselves of this avenue of relief. But this decision does not preclude a shipper from filing a complaint alleging that specific UP practices—such as a practice of routinely supplying unclean cars to shippers for loading—are unreasonable. Indeed, UP itself concedes that the complaint remedy is available if "UP applied Item 200-B unreasonably in a particular instance." UP Reply 44.[20]

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[18] For example, UP's witness notes that it is possible that some of the lading residue may accumulate on places on the car that the inspector is not required to inspect under the FRA's rules, such as the back of a wheel.

[19] Rail carriers have an obligation to provide clean cars to their shippers. See Liability for Contaminated Covered Hopper Cars (Hopper Cars), 10 I.C.C. 2d 154 (1994).

[20] Requiring a shipper to bring a complaint about specific UP practices does not, as NAFCA suggests, contravene the ruling in Hopper Cars. There, the Interstate Commerce Commission found unlawful a tariff provision explicitly requiring shippers to inspect railcars that the carrier furnished before loading them and to accept liability for damages to the product if they loaded it into a contaminated car. Here, the tariff does no such thing; it simply assesses a penalty charge on receivers that leave lading residue on cars after unloading, and on shippers that leave lading residue on loaded cars they tender to the carrier after loading (a process that, as noted, NAFCA concedes "is bound to [cause] some degree of product residue").

In short, Section I of the tariff is not unreasonable.

Section II. Section II of the tariff provides that UP may impose a $650 surcharge on a customer after an unclean car has been switched from the spot where it was tendered, but before it leaves the customer's facility where it was loaded or unloaded. In that case, Section II provides that UP may also assess applicable intra-plant switch charges for removing the car from the train and setting it out.

As we have already found that the surcharge in Section I is not unreasonable, we do not find that this provision of the tariff is unreasonable either. This provision places no greater burden on the shipper than the requirement of Section I. Because UP needs to ensure that cars are clean and safe before it accepts them for movement, it should not matter whether the surcharge is assessed for problems discovered before the car is switched from the spot at which it is tendered by the shipper or after it has been tendered but while it is still in the shipper's facility.

NAFCA argues that imposition of the $650 surcharge on top of a switching charge is unreasonable. Its position is that if the switching charge applies, that by itself should cover UP's costs, and so UP does not need the $650 to cover any more costs. But as UP points out (UP Reply 8, 12-14), the surcharge is not intended to recover a cost that it directly incurs as a result of lading residue on the car. Rather, as with the identical charge in Section I, it is primarily intended to incentivize shippers to implement preventative measures that enhance safety. Again, imposition of surcharges in this manner is not unreasonable given the potential operational disruptions that lading residue could cause. As with Section I, Section II is not unreasonable.

Section III. Unlike Sections I and II, which address the condition of railcars while at the shipper's facility, Section III provides that if UP identifies a problem after the car has been accepted and removed from the facility, it may: 1) set aside the car; 2) notify the shipper of the condition and their responsibility to return the car to a clean and safe condition; 3) charge the shipper applicable switch charges for removing the car; and 4) impose a $650 surcharge. NAFCA argues that UP might apply the provision unfairly and that the tariff could even allow UP to place blame on an "innocent shipper" whose car followed behind a leaking car.[21]

We have already found that the shipper is responsible for loading, unloading, and securing cars to prevent product leakage, and we recognize that a problem discovered while a car is en route could in some cases be caused by a shipper's failure to properly secure or seal the car during loading. But that possibility does not mean that, once the car has left the shipper's facility and is under the care, custody, and control of UP, it would be reasonable for UP to automatically hold the shipper responsible in all cases of contamination. As the Board stated in Coal Dust I, "once a railroad accepts a loaded car, it bears responsibility for transporting the car in a manner that avoids releasing or spilling the shipment." Coal Dust I, slip op. at 14. Here, after a car has

[21] NAFCA Rebuttal 18.

been accepted, inspected per the FRA's inspection requirements, switched into a train, and departed the shipper's facility, the car could become contaminated with lading residue or other foreign material during transit[22] in ways that might have no relationship to the manner in which the shipper tendered the car for shipment (for example, if a car is following a leaking tank car or if there is something on the tracks that causes the wheels or safety appliances to be contaminated).

UP does not dispute that there could be causes not attributable to the shipper that lead to lading residue adhering to a car. UP states that it would not apply the tariff unfairly in such cases, and that it has not applied the tariff's surcharge to parties that were not responsible for lading residue.[23] However, there may be instances in which the source of the lading residue is itself in dispute. UP's assurances alone about how it would apply the tariff, however, do not provide a shipper sufficient information. Such assurances are not included in the tariff and the Board has found overbroad and ambiguous language in tariff provisions to be unreasonable. See, e.g., Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions (Coal Dust II), FD 35557, slip op. at 30 (STB served Dec. 17, 2013) (overbroad and ambiguous language in tariff provisions that would not adequately inform shippers of what service terms they are accepting found to be unreasonable).

Section IV. Finally, Section IV states that even if the shipper is assessed the surcharge, it is not relieved of any property damage or costs associated with environmental contamination and cleanup, personal injury, or death attributable to lading leakage or lading residue. Section IV also states that UP's acceptance of a railcar that is later determined to be leaking or to have lading residue on its exterior will not relieve the shipper that released the car of its obligations, and shall not constitute a waiver by UP of the shipper's obligations to tender railcars suitable for safe movement. NAFCA argues that this provision imposes absolute liability on a consignor even if UP failed to adequately inspect the railcar.

We disagree and find that the provision is neutral. There are two aspects to the provision pertaining to liability: first, that payment of a surcharge by a shipper does not absolve the shipper of liability that would otherwise apply in the event of a loss; and second, that acceptance by UP of a car with lading residue does not constitute a waiver by UP of any defenses it may have in a later civil lawsuit. NAFCA expresses concern that this provision could "shift" liability from UP to a shipper in a civil suit. But in our view, the provision does nothing more than say that UP's liability, or the liability of a shipper or receiver—whatever that liability may be—must

[22] The FRA inspection requirement is not directed at lading residue, and this sort of an inspection may not necessarily discover all residue on a car, so we do not accord it the same weight in this matter as does NAFCA. But the inspection does give UP a last opportunity to identify problems before a car becomes en route.

[23] UP Final Brief 13; UP Reply 44.

be determined without regard to this tariff. That does not constitute a shifting of liability and thus we do not find the provision unreasonable.[24]

In sum, Sections I and II of the tariff do not impose an unreasonable burden on shippers but instead reasonably encourage shippers to help address the safety hazards caused by lading residue on railcars. Section IV does not improperly shift liability and is therefore not unreasonable. Section III constitutes an unreasonable practice.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NAFCA's motion to strike is denied.

2. Item 200-B(3) of UP's Tariff 6004-C constitutes an unreasonable practice under 49 U.S.C. § 10702, but the remainder of the tariff is not unreasonable.

3. This decision is effective on its date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.

[24] The Board found a liability provision unreasonable in Coal Dust II, stating that the tariff was ambiguous and could not be reconciled with the stated intent of the liability provision. Here, by contrast, there is no ambiguity about the effect of Section IV on the liability of a customer. The concerns expressed in Coal Dust II are not present here.